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No. ....
IN THE

Supreme Court of the United States

October Term, 1981.

STURM, RUGER & CO., INC.,

Petitioner,

vs.

MICHAEL JAMES DAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

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Questions Presented.

Does the Due Process clause of the Fourteenth Amendment (which this Court has never applied in this regard) permit a state court jury to superimpose a "civil fine" on a defendant who has already paid compensation, in any amount the jury wants to assess, for whatever conduct or attitude the jury chooses to punish, without articulated standards to guide that imposition or forewarn the defendant, particularly under a court-made rather than legislatively-created rule?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

Opinions Below.

The opinions of the Alaska Supreme Court appear as follows:

Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska, 1979);

Sturm, Ruger & Co., Inc. v. Day, 615 P.2d 621 (Alaska, 1980);

Sturm, Ruger & Co., Inc. v. Day, 627 P.2d 204 (Alaska, 1981).

There were no reported opinions of the trial court.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1527(3).

The ultimate decision of the Alaska Supreme Court became final April 24, 1981, when that court rendered its "Opinion on [further] Rehearing".[1]

Constitutional Provision Involved.

No Alaska statute or constitutional provision is involved, the deprivation of property at issue being a creature of state common law, only.

The portion of the Fourteenth Amendment invoked is:

> ". . .; nor shall any State deprive any person of . . . property, without due process of law."

Statement of the Case.

This petition arises out of a civil action for personal injuries to plaintiff-respondent Day,[2] on a theory of strict tort liability for product-caused injuries. Judgment on jury ver-

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[1]This case was argued on appeal in March of 1978 and an initial decision rendered April 6, 1979. Plaintiff petitioned for rehearing and the Alaska court asked for further briefing, but conducted no hearing of any sort.

In August of 1980, an amendatory opinion appeared following which *both* parties petitioned for rehearing. Because defendant-petitioner was in doubt as to finality at that point, it sought extension of time to petition for certiorari; on November 20, 1980, the Clerk advised that extension would be denied pursuant to this Court's Rule 20.4.

Finally, the Alaska court issued an order granting rehearing in part, followed six months later by the opinion which finally determined the state-court appeal.

[2]Hereafter the parties will be identified: Plaintiff-respondent Michael James Day, "Day"; defendant-petitioner Sturm Ruger & Co., Inc., "Sturm Ruger".

Pursuant to Rule 28.1, Sturm Ruger states that the only related organization conceivably fitting the description in that rule is S.I.S., Inc., a security services (plant guards) organization, in which Sturm Ruger owns approximately 40% of the outstanding stock. There are no other parent companies, subsidiaries or affiliates.

dicts was entered by the Superior Court of Alaska, awarding Day (in addition to costs):

Compensatory damages for personal injury	$ 137,500.00
Punitive damages	2,895,000.00
Prejudgment interest	32,370.21
Attorney's fees	17,862.00
Total	$3,082,732.21

[R 1126-1129, 1318, 1330].[3]

Sturm Ruger is a corporation headquartered in Connecticut which designs, manufactures and sells a wide variety of firearms, including a single-action revolver patterned on the famous Colt .45 Peacemaker [TR III 85-86; IV 94 and XIV 116, 119-125]. Day purchased such a revolver, new, in June, 1972, receiving with it an instruction sheet containing warnings which he initially admitted but later denied reading [TR III 44, 119-120; Exhibit 11]. He had significant experience with similar Sturm Ruger firearms and also other kinds of guns and was well aware he should not point the gun at anything or carry a live round under the hammer [TR III 88, 90, 112-114 and 126]. He fired it approximately one hundred times between purchasing it and the occurrence two months later [TR III 91 and 115-116].

On the date of the accident, Day had been shooting with two children and, when finished, placed the revolver in its holster under the seat of the sub-compact Ford Courier truck

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[3]Citation to the record, stu. in the possession of the Alaska Supreme Court, will be as follows:

To the Clerk's papers, known in Alaska as the "Record", by an "R", followed by the page number or numbers;

To the transcript of the oral proceedings, "TR", followed by a volume number in Roman numerals, and page number or numbers.

To the opinions below, by the pagination of the Appendices to this petition.

he was driving; then, however, he decided it would be preferable to unload the gun. At that moment, there was (according to Day) one empty chamber, four spent cartridges and a single live round in the cylinder [TR III, 51, 57, 97-98, 113, 129-131 and 142].

Instead of getting out of the extremely small cab, Day stayed in the driver's seat and reached under the steering wheel and between his legs to take the revolver from the holster. He commenced unloading by cocking the hammer, whereupon the revolver slipped. Before it had fallen very far, he grabbed it, in the process squeezing the trigger and causing the hammer to fall (again fortuitously) on the one chamber out of six which contained a live round. The bullet struck his left leg part way down from the knee [TR III 99 and 143-145].

At the trial, Sturm Ruger was precluded from urging Day's negligence, despite Alaska's adoption of the comparative fault principle in litigation of this type. On appeal, the Alaska Supreme Court reversed for redetermination of the existence and amount of Day's contributive fault [Appendix A, pp. 4-6]. That court's actions concerning punitive damages are more intelligibly set forth in the discussion of reasons for granting the writ, below.

Presentation of Question Below.

As the Alaska court's first opinion held, the question involved here was raised and preserved in the court of first instance [Appendix A, p. 12, fn. 12]. The motion described in that note appears at pages 1064-1072 of the record and was filed and served part way through the evidence-taking. Theretofore, Sturm Ruger's answer to the first amended complaint had put the claim for punitive damages in issue [R 22-23].

In the appellate court, the contentions raised here were first presented by Sturm Ruger's opening brief, pages 14-40.

REASONS FOR GRANTING THE WRIT.

The issue presented by this petition is one which — despite a fog of misapprehension to the contrary — has never been decided by this court, *i.e.*, the constitutionality, vel non, of allowing juries to impose standardless, unpredictable and wholly discretionary punishments on litigants under the rubric of a civil action for exemplary, punitive or vindictive damages.[4]

Before demonstrating the accuracy of the statement that this *is* a matter of first impression here, it is useful to put the issue in focus through analogy by assuming a state's legislature were to enact, or its judiciary to adopt as a proposition of court-made law, the following rule:

> If the jury believes an accused person's behavior can be characterized as indifferent, malicious or wanton — however the jury chooses to define those terms — the jury may, if it so desires, punish the accused for that conduct by imposing such forfeiture of property and compulsory donation thereof to others as the jury chooses, in order to punish and make an example.

That is an accurate paraphrase (unchallenged by any court or party below) of what the jury was told to do, and what it did, in this case. It is also an accurate reflection of punitive damage practice as it exists, by statute or decision law, in most American jurisdictions.[5] Such penal "rules" are not

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[4]As far as can be told, there is no substantive difference among exemplary, punitive and vindictive damages. For convenience, the most common of the three terms, "punitive", will be employed here.

[5]For example:

Legislative adoption: California Civil Code §3294; Colorado Revised Statutes §13-21-102; Minnesota Statutes Annotated §549.20.

Judicial creation: Arizona — *Gila Water Co. v. Gila Land & Cattle Co.*, 249 P. 751, 753, 754 (1926); Illinois — *Mattyasovsky v. West Towns Bus Co.*, 330 N.E.2d 509, 511 (1975); New Jersey — *Leimgruber v. Claridge Associates, Ltd.*, 375 A.2d 652, 654-655 (1977); New York — *Walker v. Sheldon*, 179 N.E.2d 497, 498-499 (1961) Ohio — *Saberton v. Greenwald*, 66 N.E.2d 224, 229 [1]; (1946); Virginia — *Giant of Virginia, Inc. v. Pigg*, 152 S.Ed.2d 271, 277 (1967).

Somewhat ironically, Alaska had, until this case, neither statute *nor* decisional articulation of the punitive damage process (see, *Haskins v. Shelden*, 558 P.2d 487, 494, fn. 14 (Alaska 1976).

entirely without precedent, as pointedly noted in one state court:

> "Compare a German law, signed by Adolf Hitler on June 28, 1935 which, in translation, reads in part as follows: 'Whoever commits an act which the law declares to be punishable or which deserves punishment according to the fundamental concepts of a penal law and sound popular feeling, is punishable. If there is no penal law which directly applies to such deed, it shall be punished according to the law the basic concept of which is most applicable.' "
>
> *In re Davis*, 51 Cal.Rptr. 702, 709-710, fn. 12 (Cal.App. 1966).

If such legislation or court-made rule were interpreted to allow juries to imprison persons whose behavior, evaluated ad hoc and post hoc, were determined by a totally subjective and totally discretionary process to be indifferent, malicious or wanton, there is not a court in the Union which would tolerate such process — even if the imprisonment were for a few days as a misdemeanant. And, if some state did, this Court would answer with Mr. Justice Holmes, "Not while this Court sits".[6] Even if the impact of such a juroral blank check were that of a mere criminal fine, paid to the public treasury, the due process infirmity (please see §II below) would be unmistakable.

Yet, if one merely changes the linguistic cosmetics to call a fine a "civil penalty" by means of punitive damages, giving the fine as a windfall to the plaintiff — who, by definition, has *already* been compensated — rather than sending it to the public treasury, then:

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[6]See, *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) [dissenting opinion]; see also, *National Cable Television Assn. v. United States*, 415 U.S. 337, 341, fn. 4 (1974).

— A pharmaceutical company may be assessed 37 million dollars in punishment (on top of 113.6 million dollars in trebled antitrust damages, plus the compensatory sum of 56.8 million dollars, for an aggregate of 207.4 million dollars) for failing to market a black box with wire attachments designed to replace aspirin (*The Washington Post*, July 4, 1981, reporting a verdict rendered July 2 in the United States District Court for the District of Minnesota);

— The former Miss Wyoming may recover 25 million dollars (half of it later remitted), in addition to 1.5 million dollars in compensatory damages for a fiction piece in a magazine which allegedly libeled her (*The Washington Post*, February 21, 1981, reporting *Pring v. Penthouse, et al.*, United States District Court, District of Wyoming, and see same publication April 17, 1981);

— A California jury, after awarding over three million dollars in compensation to persons admittedly injured, allegedly through improper design of a Pinto automobile, may add 125 million dollars in punitive damages, subsequently remitted to "only" 3.5 million dollars (*Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 34 (Cal.App. 1981).

This petition asks "Why the difference?", a question yet to evoke satisfactory answer. It questions why an American manufacturing company is denied the same due process in being "deprived of . . . property" that is so lavishly available to the heroin processor, the rapist, or even the moonshiner. As the examples just cited suggest, today's manufacturer is in no little need of due process.

I.

Contrary to Popular Impression, This Court Has Never Passed on the Constitutionality of Punitive Damages.

It is widely thought that this Court has upheld punitive damages on due process challenge. This is simply a historical inaccuracy, no matter how often repeated.

The case in which such purported finding of constitutionality is almost universally said to have been made is *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851). It is a decision which simply is not up to the task assigned it by superficial research.

The Court in that pre-Civil War case was not making any kind of constitutional decision; it was sitting as an ordinary civil court attempting to identify the ordinary common law of England, the handful of states and the young nation. The civil case before it did involve punitive damages and the Court mentioned their existence as a matter of legal history, but that, it seems safe to state, is not equivalent to an imprimatur of constitutionality; the Court has dealt with many things which, when later tested, did not turn out to be constitutional.[7]

The inaccuracy in characterizing *Day* is not all that abstruse; it takes no more than a reading of what Mr. Justice Grier wrote for that court. No part of the Constitution *is even mentioned* in the entire opinion; no one raised any due process question (perhaps because the Fourteenth Amendment had not been adopted yet). It is, of course, a truism

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[7]The phenomenon of widespread but inaccurate belief that a constitutional issue has been laid to rest is not entirely unknown. Correcting such misapprehensions assumes particular importance where there are growing rumbles of discontent over the rule in question (*see Sidle v. Majors*, 429 U.S. 945-947 (1976) [Mr. Justice Brennan and Mr. Justice Marshall dissenting from denial of certiorari]).

that a case is not authority for a proposition which was not placed in controversy.

> *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968).

It is also sometimes thought that *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) reaffirmed a supposed constitutionality holding in *Day*. If so, the lead opinion in *Butts* (the Court was considerably fragmented; see footnote, 388 U.S. at 133) chose strange wording:

> "Curtis [the petitioner] recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case, Day v. Woodworth [citation] but contends that an unlimited punitive award against a magazine publisher [has constitutional infirmity]." 388 U.S. at 159.

A case in which this Court merely notes that a party has expressly eschewed a constitutional challenge seems the very paradigm of one which is not authority on the inchoate constitutional issue.[8]

Therefore, this case presents an increasingly rare phenomenon: A request that this Court pass, *tabula rasa*, upon an issue which has never actually been before it, rather than a question of whether to depart from or clarify or modify precedent, adapt a rule to changing conditions or new facts, or the like. The due process propriety of punitive damages is an issue which, as will be seen in the succeeding two

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[8]Of interest is the fact that, among the relatively sparse number of references to *Day* in this Court, all appear to have been on other topics and none seems to have confronted the issue presented here — again undoubtedly because nobody raised it. For instance: *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 249-250 (1975) [cited for the proposition that attorneys' fees are not normally recoverable in the absence of statute or contract therefor]; *Hall v. Cole*, 412 U.S. 1, 5-6, fn. 6 (1973) [same]; *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) [same]; *United States v. Hess*, 317 U.S. 537, 550 (1943) [approving treble damage remedy].

sections, is conspicuously in need of illumination from this Court, and one which should be resolved in favor of extending the same due process to responsible American businesses and economic institutions as is proudly afforded to those accused of crimes in proceedings labeled "People", "State" or "Commonwealth".

II.

Standardless, Arbitrary and Wholly Discretionary Imposition of Civil Fines Is Incompatible With the Guarantees of the Due Process Clause.

The matrix of this discussion is not difficult to find.

> "Vague laws in any area suffer a constitutional infirmity."
>
> *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

And:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act, whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.
>
> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966).[9]

Neither is it difficult to find apt judicial descriptions of the type of laws to which this petition applies those principles:

> "Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'
>
> * * *
>
> "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages [citations], the impact of these windfall recoveries is unpredictable and potentially substantial.
>
> * * *
>
> "Moreover, it cannot be ignored that punitive damages may be employed to punish unpopular defendants."
>
> *IBEW v. Foust*, 442 U.S. 42, 48, 50, and fn. 14 (1979).

And:

> "In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views."

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[9]See also authorities collected in *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-616 (1971); *Connally v. General Const. Co.*, 269 U.S. 385, 391-393 (1926).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

The second group of judicial declarations, Sturm Ruger submits, epitomizes precisely that which is proscribed by the first group. That, really, is what this petition boils down to.

As the Court said in *Giaccio* (*supra*, 382 U.S. at 402), the due process right to be free from taking of property through vague and standardless laws cannot be abrogated by the simple device of labeling the penalty "civil" rather than "criminal" (see also, *Katz v. Superior Court*, 141 Cal.Rptr. 234, 243-244 (Cal.App. 1977)).

Of course, the void-for-vagueness doctrine is usually invoked in the context of a statute, but there is no reason to believe the principle to be restricted to legislation. The simple fact is that statutes, by their nature, may need due process scrutiny more often, but scrutiny is clearly required whenever there is state action of *any* sort. Conceptually, of course, it is harder to analyze something (such as the Alaska punitive damage principles) that is not reduced to a statutory formula but is instead an amorphous doctrine of the common law, in terms of the warning afforded a citizen faced with its potential operation, but a too-vague statute gives at least *some* warning, whereas a too-vague principle of unwritten law such as punitive damages is no warning at all.

One significant reason for the void-for-vagueness doctrine, pointedly applicable to non-statutory rules, inexorably applies to the punitive damage practice.

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."
>
> *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972);

And see authorities cited in fn. 9, *supra*.

Indeed, the history of this very case and its treatment in Alaska illustrates the point. One finds the trial judge, often thought to be the main line of defense against irrationality,[10] flatly refusing even to consider reviewing the punitive award, stating:

> "The whole matter of punitive damages in these cases is going to have to be determined by the [Alaska] Supreme Court and I wouldn't disturb [the amount of the fine]" [Transcript of Motion for New Trial, p. 30:20-22].

With gentle restraint thus reduced to nothingness, the Alaska Supreme Court in 1979 (13 months after oral argument) discussed the factors which it divined to constitute the due process guides for juroral imposition of civil fines, applied those factors to the appellate record before it, and concluded:

> "The punitive damage award of $2,895,000 appears to be so out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice. The jurors apparently responded to an invitation to punish Sturm, Ruger for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff. [Citation.] . . .
>
> "*After a careful review of the evidence and all of the factors which should bear upon this determination*, it is our opinion that if punitive damages are awarded at a second trial, on essentially the same evidence as that presented in the first trial, they should not exceed $250,000. That amount is quite sufficient to achieve

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[10]See, C. McCormick: Law of Damages, §77, p. 278, quoted in *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 397 [dissenting opinion]; and compare the opinion of the Alaska court itself [Appendix A, pp. 21-23, particularly fns. 16 and 17 and accompanying text].

the deterrent purposes to be served, without at the same time inflicting a penalty disproportionate to the defendant's wrong" [Appendix A, pp. 18, 22-23, emphasis added].

Sixteen months later[11] — without affording either party any opportunity to be reheard — the Alaska Supreme Court (which, it will be recalled, stated the first time around that it had carefully reviewed all of the evidence and all the factors which should bear), issued an "Opinion on Rehearing," saying:

> "On reflection,[12] we have decided upon a different course . . . After reviewing the record once more, we are now of the opinion that the punitive damage verdict was not the result of passion or prejudice. It was simply an excessive verdict . . .
>
> "After further consideration of the evidence and the factors, mentioned above, which bear upon the reduction of an excessive punitive damage award, we are of the view that in our original opinion we reduced the award unduly. In our opinion the award should be

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[11]The court did, after its first decision, request briefing on two questions: (1) "Whether upon remand from this court the amount of compensatory damages awarded by the jury's verdict should remain as it is, and whether any retrial should be limited to the question of [Day's] comparative negligence", and (2) "Whether, on remand, a retrial is required on the question of punitive damages, and, if not, whether the superior court should then rule on the question of remittitur". Whatever the clarity of those two questions, it is self-evident neither went to the merits.

However, it should be noted that, when it responded to those questions, Sturm Ruger gently pointed out that, under decisions of this Court (see *Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521-522 (1931)) and the Alaska court itself (see *Intern. Bro. of Team., Local 959 v. King*, 572 P.2d 1168, 1179 (1977)), the finding of passion and prejudice militated in favor of a total new trial and not just one on limited issues.

[12]It is to be recalled that this 16 months of reflection followed an earlier 13 months of self-described "careful review" and *total* consideration.

reduced to the amount of $500,000 rather than the $250,000 set by our original opinion" [Appendix B, pp. 6-7].

It is inexorable fact that the same five judges — by definition reasonably prudent persons — after giving the same cold record exacting study, first for 13 months and then for 16 months, concluded once that the result flowed from passion and prejudice and another time that it was "simple excessiveness" (in itself a somewhat scholastic distinction), concluded once that anything over a quarter-million dollars was unnecessary, excessive and impassioned, following which the same record convinced those same judges that twice as much was just dandy and to be awarded forthwith.[13]

If supreme court justices find the problem of defining, channelling, justifying and evaluating punitive damages that volatile, baffling and productive of self-contradiction, the question of how lay jurors are expected to operate in any manner other than what *Giaccio* described as "vague and standardless" hardly needs to be asked. Of interest is the Alaska court's observation that "[J]udicial scrutiny over the awards provides a partial justification for allowing such awards in the first place" [Appendix A, p. 21]. Empirically, the history of this case shows that justification to be illusory (putting aside its self-levitating nature).

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[13]Bearing in mind that justice must appear to be done as well as be done in fact, that flip-flop is intrinsically distressing. To most lay minds, a judicial change of heart without an iota of new input or opportunity for the litigants to be heard formally, suggests all sorts of nefarious suspicions — particularly where that flip-flop is measured in quarter-millions of dollars.

Even the mildest of such reactions produces discomfort: The fear that Sturm Ruger was fined an extra $250,000 for its temerity in pointing out an obvious inconsistency between the finding of passion and prejudice and the granting of only a partial new trial (please see fn. 11, *supra*).

The courts of New York have described the problem accurately:

> "Actual damage is measurable against some objective standard — the number of pounds, or days, or gallons or yards; but punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not accept readily the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs, as well as actionable private wrongs, they have had rather close judicial supervision. If the usual rules were followed there would be no effective judicial supervision over punitive awards . . .".
>
> *Matter of Publishers' Assn. of N.Y. City*, 114 N.Y.S.2d 401, 404 (1952).

Of further interest is the fact that the Alaska Supreme Court's second decision remands this case for retrial as to the extent to which Day's *compensatory* damages are to be reduced — possibly to zero — by his own contributory fault, but the punitive damages ancillary thereto are to be awarded immediately, with their amount inviolate [Appendix B, pp. 28-29]. Since the relationship of compensatory damages to punitive damages is an important factor in evaluating the latter [Appendix A, pp. 16 and 18], this creates a logical conundrum: X must bear a reasonable relationship to Y, and Y is going to be changed (perhaps done away with), but X remains the same. In point of fact, the overwhelming American rule is that vacation of the compensatory award automatically requires vacation of the punitive,[14] but here the decision is not even to wait and find out what happens to the plaintiff's claim to compensation

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[14]See, *Yacht Club, etc. v. First Nat. Bank, etc.*, 623 P.2d 464, 476 [15] (Idaho 1980).

— just give him his windfall and send him on his way.[15] This legerdemain also exemplifies a process which "leaves judges and juries free to decide, without any legally fixed standards", in the language of *Giaccio*.

III.

The Need for Resolution of the Question Is Compelling.

The examples cited in the introduction to this discussion (pp. 7 to 8) have, not surprisingly, evoked a stirring of concern in various quarters. While that concern comes curiously late[16] and, as of this writing, is still scattered, its existence is clear.

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[15]It should not be thought either (1) that the Alaska Court is alone in this type of illogic, or (2) that the potential mentioned in text is only hypothetical. On May 28, 1981, a special verdict was returned in case No. CV-80-70-GF of the United States District Court for the District of Montana, *Shekell v. Sturm, Ruger & Co., Inc.*, an action for damages based on the allegedly defective condition of another Sturm Ruger product. While the product, injury, etc., were significantly different, the result is interesting: The plaintiff was found to have sustained damages of $22,236.08; however, it was also found that his own fault contributed 80% to his injury, so that the actual damages recoverable were reduced to $4,448. Nonetheless, that plaintiff — whose contribution to the injury was four times that of the manufacturer — was awarded $100,000 in punitive damages, 22½ times the actual injury.

The plaintiff in that case was also represented by the same attorney who represents Day in this litigation (please see discussion at page 22, *et seq. infra*). As this petition was being completed, Sturm Ruger was served (on July 13) with briefing by Day in the Alaska courts, *demanding* that Day be allowed to collect the punitive damages right now, although the judgment is bonded far beyond the amount in controversy. He denounces review here as "one of many delaying tactics" to be endured and excoriates Sturm Ruger for its "effort to delay paying the punitive damage portion of the Judgment in hopes of awaiting the outcome of some future trial" — one which will decide whether Day is entitled to *any* actual damages.

[16]Perhaps the belatedness of the recognition is not as surprising as suggested in text. After all, it has been barely a decade since the first observed million dollar punitive damage award; today, awards running up into hundreds of millions are not unknown, while the million dollar figure seems an almost "nuisance value" statistic. After all, too, only 12 years ago one of the most liberal and precedent-breaking state courts solemnly reversed a total judgment of $25,000 (a substantial but unquantifiable portion of which was punitive) as excessive and shocking to the judicial conscience (*Cunningham v. Simpson*, 81 Cal.Rptr. 855, 859-861 (Cal. 1969)); today one can almost certainly predict appeals for inadequacy as to such figures.

(footnote continued on following page)

In the course of one decision setting aside a 10 million dollar punitive damage award, but only by remitting it to 2.5 million, one finds the following:

> "[T]he reprehensible conduct of defendant Sears, Roebuck & Company in this case is deserving of stern retribution. But I do not believe California's legislative and judicial authority to be so barren of remedial resources that retribution may be accomplished *only* by giving to plaintiffs a windfall, *to which they concededly have no right* . . . I am fearful that the law of punitive damages . . . no longer serves any public policy, or the legitimate interests of the unentitled recipients of its concededly accelerating largesse.
>
> * * *
>
> "[A punitive damage award] becomes logically indistinguishable from the fine imposed as punishment for a misdemeanor, or for a felony where the punitive damages exceed $500 [Penal Code citations] . . . I would entertain doubt as to their due process survivability. Placing unrestricted power in a jury to direct punishment for 'evil intent' by compelling the 'evil-doer' to pay money to another without right thereto, seems foreign to any concept of due process known to me. And such implications seem compounded by the permitted procedures, such as the preponderance of evidence test, and compulsory self-incrimination, etc.
>
> * * *
>
> "Thus in a sense we, even the most prudent among us, are constantly threatened by an immovable and treacherous Sword of Damocles. For a misguided act or perhaps the misguided verdict of a jury any of us, denied the right of indemnification by insurance, is subject to possible visitation of disaster."

There is certainly no field of law in the United States — not even criminal procedure — which has exploded so dramatically in such a short time as punitive damages.

Rosener v. Sears, Roebuck & Co., 168 Cal.Rptr. 237, 248 *et seq.* (Cal.App. 1980) [concurring opinion]; emphasis in the original; app. dism.; *Sears, Roebuck & Co. v. Rosener*, ... U.S. ..., 101 S.Ct. 1772 (1981).

Similarly:

"The fact is that punitive verdicts in the millions of dollars are providing both a bonanza and a disaster. The question is, for whom? At present, the sole distinction is whether one is a plaintiff or defendant. But if the trend continues, the economic effects will be visited upon society as a whole.

* * *

"[T]he bonanza verdict may affect more innocent people than mere stockholders and policyholders. If a corporation is required to pay a multi-million dollar verdict from cash flow, the reduction in earnings can cause loss of jobs, not only to the defendant's employees but to other trades and businesses in the defendant's community that depend upon the prosperity of that industry. Consumers may be affected by increased prices, and innocent creditors of the corporation may be affected as well.

* * *

"While a civil jury expresses its aggressions in a less violent way, the opportunity to assess punitive damages with society's reinforcement may be irresistible. In a given case, the inventive arguments of plaintiffs' counsel, coupled with apparent judicial permission to punish, may be one reason juries have exercised their discretion to annihilate defendants with multi-million dollar verdicts."

DuBois, "Punitive Damages: Bonanza or Disaster?" 3 Litigation 35, *et seq.*, Fall, 1976;

And see, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 662 [31] (D.C. Cir. 1966);

Wangen v. Ford Motor Co., 294 N.W.2d 437, 468, 472 [dissenting opinion] (Wis. 1980).

Thus, whether one reads the general press, the expressions of alarm among jurists or the comments of concerned observers in the legal profession, the message is clear that the intensity of this constitutional problem is not some invention of Sturm Ruger's imagination. It is real, it is grave, and it is inescapable. It also impinges on some basics of our social structure, as noted by the much honored Chief Judge Breitel.

> "Punitive sanctions are reserved to the state . . . one purpose of the rule of law is to require that the use of coercion be controlled by the state. In a highly developed commercial and economic society the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions . . . For centuries the power to punish has been the monopoly of the State, and not that of any private individual. The day is long past since barbaric man achieved redress by private punitive measures."
>
> *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 796-797 (N.Y. 1976) [internal citations omitted].

This suggests another consideration. As one circuit has pungently observed, there is no justification for plaintiffs to contend that they have, as a matter of right, "the opportunity to act as private attorneys general to effect the deterrence and retribution functions" of the state by employing in their own right for "noncompensatory purposes"

the "serious and often unpredictable effects of allowing actions for punitive damages".[17]

> *In re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), *cert. den.* 101 S.Ct. 387, citing *IBEW v. Foust, supra*, 442 U.S. at 48-52.

The reality of the situation even goes somewhat further; it is not just private plaintiffs seeking letters of marque, but — perhaps more eye-openingly — the creation of a roving band of private attorneys general's *attorneys*. Sturm Ruger's extracts of various court files show that, as of the time this petition is written, the attorney who represented Day in the court below was or is counsel for a plaintiff in *thirty-three* separate actions against Sturm Ruger alone, either currently pending[18] or already termi-

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[17]It is significant to recall that a manufacturer of a defective product is not exactly exempt from the more normal type of sanction, applied predictably and with advance standards. Under the Consumer Products Safety Act, such a manufacturer faces a penalty of $2,000 for each violation up to a maximum of $500,000 for any related series of violations (15 U.S.C. §2069).

[18]The following cases, listed alphabetically by state and plaintiff, brought by Day's counsel, are pending against Sturm Ruger:

Alaska:
Michael Day, Superior Court No. 72-669; Supreme Court No. 3092
Edge/Malcolm, U.S.D.C., No. F-79-24 CIV
Brenda Mullins, Superior Court No. 4FA-8;-74
California:
James Killion, Sacramento Superior Court No. 281963
Ernest Small, San Diego Superior Court No. 467,483
Connecticut:
Edgar Ferguson, U.S.D.C., No. B-75-4
Florida:
Angela Sue Kendrick, U.S.D.C., S.D., No. 78 6403 CIV NCR
Idaho:
Phillip Freeman, U.S.D.C., No. CIV 79 3088
Mississippi:
Howard McDonald, U.S.D.C., S.D., E.D., No. E 79-0084(N)
Charlotte Brady Welch, U.S.D.C., S.D., No. S80-0280(N)
Montana:
James Shekell, U.S.D.C., No. CV-80-70-GF
Robert Smith, U.S.D.C., No. CV -80-69-GF
Tim Zahrte, U.S.D.C., No. CV-78-19-BU; see 498 F.Supp. 389

(footnote continued on following page)

nated[19] in thirteen different jurisdictions (either in the state courts or in the district courts as diversity matters).

There is some reason to question whether privateering by lawyers against certain target defendants — whether inspired by avarice or by desire to play the circuit-riding hangman — is a healthy manifestation of due process. In this regard, it appears this Court's concern over the fact that "the prospect of lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair" punitive damage lawsuits (*IBEW v. Foust, supra*, 442 U.S. at 48) was abundantly justified, if somewhat over-optimistically restricted in its focus.

Pennsylvania:
Dawn Martin, U.S.D.C., E.D., No. 80-2685
Washington:
Joe Hallman, Pierce County Superior Court No. 253748

[19]The following cases, listed alphabetically by state and plaintiff, have been completed:

Alaska
Sheffield Barkwell, U.S.D.C., No. F-76-11
Charles Brown, Superior Court No. 73-621
Roy David, Superior Court No. 76-1013
Naomi Dodge, Superior Court No. 74-564
Wayne Jones, U.S.D.C., No. F-75-5
Diane Oftedahl, U.S.D.C., No. F-74-11
Edgar Shields, U.S.D.C., No. A-77-103
Raymond Triott, Superior Court No. 79-240
Arizona:
Paula Foster, Pima County Superior Court No. 170,208
Robert & Sue Nix, Pima County Superior Court No. 186064
California:
Concepcion Sindelar, Sacramento County Superior Court No. 281,940
Donald Heaton, Sacramento County Superior Court No. 272.845
Michigan:
Robert Trent, U.S.D.C., W.D., No. G77-156-CA(1)
Frank Nicholson, Oakland County Circuit Court, No. 77 160 224 NO
Mississippi:
John Hall, U.S.D.C., S.D., No. H-79-0091(R)
Montana:
Marjorie Sullivan, U.S.D.C., No. CS-77-65-BW
New York:
Mario Scalzo, U.S.D.C., E.D., No. CV 80 0406
West Virginia:
Lewis and Hudnall, U.S.D.C., S.D. No. 76-0105-CH

Another and final reason why the issue presented here begs attention is the punitive damage system's potential unfairness to the very interest it purportedly advances: carrying out the public's remonstrative and exemplary objectives. As this Court has noted, punitive damages are likely to be "both a speculative and inappropriate remedy" in many cases (*Snepp v. United States*, 444 U.S. 507, 510, 512 (1980)). This follows, of course, from the fact that jurors, even if they find a defendant guilty of the supposedly egregious conduct which justifies civil fines, remain free to decide with unfettered license that they don't want to punish that defendant anyway.

Such, it must be remembered, is the nature of the system and it cuts badly in the very direction which its apologists advance as a justification. To repeat the analogy at the outset of this petition, it would be a strange system of criminal law which allowed juries to convict felons but, in their sole, standardless and unrestrainable discretion, nevertheless to exempt whatever felons they select from punishment for their offenses.

Conclusion.

For the reasons set forth here, certiorari should be granted. For those reasons and reasons to be developed on briefing, the judgment of the Alaska Supreme Court should be reversed on the ground that such standardless, arbitrary and unpredictable fines violate the due process clause.

Respectfully submitted,

EDWARD L. LASCHER,
WENDY C. LASCHER,
Attorneys for Petitioner.

APPENDIX

APPENDIX A.

Opinion.

The Supreme Court of the State of Alaska.

Sturm, Ruger & Co., Inc., a Connecticut corporation, Appellant, v. Michael James Day, Appellee. File No. 3092.

Michael James Day, Cross-Appellant, v. Sturm, Ruger & Co., Inc., a Connecticut corporation, Cross-Appellee. File No. 3135.

[No. 1834 - April 6, 1979].

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, James R. Blair, Judge.

Appearances: Robert L. Richmond, Richmond, Willoughby & Willard, Anchorage, and Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin and Edward L. Lascher (in association), Anchorage, for Appellant/Cross-Appellee. H. Bixler Whiting, Fairbanks, for Appellee/Cross-Appellant.

Before: Boochever, Chief Justice, Rabinowitz, Connor, and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating]

CONNOR, Justice. DIMOND, Senior Justice, dissenting in part. BURKE, Justice, dissenting in part.

This is a products liability case.

Appellee Michael James Day bought a .41 magnum single action revolver on June 1, 1972. The gun had been manufactured two years before by appellant Sturm, Ruger and Company, in August of 1970, but was purchased new by Day.

On July 30, 1972, Day was sitting in the cab of his small pickup truck with two young friends when he decided to unload his gun. As he was unloading the revolver, the gun

slipped out of his hands. When he grabbed for the gun it fired, the bullet striking his leg and causing serious injuries.

The Sturm, Ruger .41 magnum single action revolver had four hammer positions which were described as follows in the instruction booklet provided by the manufacturer:

There are four possible positions in which the hammer may be placed, as shown on Figure 1:

1. Hammer resting on firing pin.
2. Hammer resting on safety notch.
3. Hammer resting on loading notch.
4. Hammer resting on full cock notch.

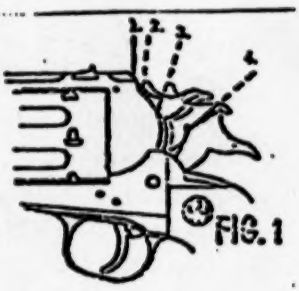

FIG. 1

The safety and loading notches are designed so that the hammer cannot be released from either of these positions by normally pulling the trigger.

The third page of the instruction booklet accompanying the revolver warned that the gun could be fired from the loading notch position by exerting "excessive pull on the trigger." This warning was set off from the rest of the instructions in a separate box:

> WARNING: This revolver can be fired by excessive pull on the trigger from either the safety notch position, indicated by No. 2 in Figure 1, or the loading notch position indicated by No. 3 in Figure 1.
>
> The loading notch and the safety notch provide only partial security. If these notches are damaged, as they may be "fanning", they offer no security. Never depend on this or any other mechanical safety device to justify pointing the firearm at any person.

Fanning is unsafe for you and abusive to your revolver.

Day filed suit against Sturm, Ruger and Company. His second amended complaint was based on a theory of strict tort liability, and included a claim for punitive damages. It was Day's contention that the hammer had been on the loading notch and that the gun fired after he accidentally pulled the hammer off that notch, presumably by pulling the trigger as he caught the falling gun.

The jury returned a verdict for the plaintiff, finding specifically that the revolver was designed defectively and that it had a manufacturing defect as well. The jury awarded $137,750.00 in compensatory damages and $2,895,000.00 in punitive damages to the plaintiff.

Sturm, Ruger filed a timely motion for new trial and for judgment notwithstanding the verdict. This motion included a request that the trial judge consider reducing the punitive damages award. The trial judge declined to order any remittitur.[1] This appeal followed.

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[1]Sturm, Ruger's motion for new trial and for judgment notwithstanding the verdict, filed on June 7, 1976, argued that the amount of punitive damages awarded by the jury could not be sustained because it bore no reasonable relationship to the amount of compensatory damages. Sturm, Ruger's memorandum stated that "the court may consider it appropriate at this stage to order a reduction in the verdict which at a minimum brings the punitive award to a level where it bears some reasonable relationship to the actual damages." At the hearing on Sturm, Ruger's motion for new trial, counsel for Mr. Day objected to any discussion of a remittitur on the ground that the defendant had neglected to file a "motion for remittitur." The judge stated that he would not consider reducing the amount of the verdict in part because there had been no "motion for remittitur."

Thereupon, Sturm, Ruger filed a pleading entitled "Motion in Support of Remittitur" on August 2, 1976. In its accompanying memorandum, Sturm, Ruger pointed out that the issue had been raised earlier, in the post-trial pleadings and in oral argument. The trial judge denied the remittitur motion, ruling that it was not timely under Rule 59(f), Alaska Rules of Civil Procedure.

We believe that this was error. The point was brought to the trial judge's attention following the jury verdict, but prior to the entry of judgment, and was therefore timely under Rule 59(f), which requires that motions to alter or amend a judgment must be served "not later than 10 days after the entry of the judgment." Having raised the issue of excessive damages in its motion for new trial and for judgment n.o.v., Sturm, Ruger was not required to submit a separate "motion for remititur."

The questions raised by Sturm, Ruger's appeal may be divided into three basic subject areas: comparative negligence, the propriety of certain jury instructions, and punitive damages.

Michael Day, in his cross-appeal, claims that the trial court's refusal to consider the amount of the punitive damage award in calculating attorney's fees was manifestly unreasonable.

I
COMPARATIVE NEGLIGENCE

In *Butaud v. Suburban Marine & Sporting Goods, Inc. (Butaud II)*, 555 P.2d 42 (1976), we held that the doctrine of comparative negligence is applicable in products liability suits. Since the instant case was pending on appeal at the time the second *Butaud* decision was announced, Sturm, Ruger argues that the trial court's refusal to consider any form of comparative fault requires reversal.

Sturm, Ruger's principal contentions are that Michael Day was negligent in unloading his gun in the confined spaces of the cab of his pickup truck; in failing to read or to remember the instructions which came with the gun; and, inferentially, in accidentally dropping the gun. On these facts, the trial judge ruled, as a matter of law, that the plaintiff was not negligent.

If the trial court was correct in ruling that the plaintiff's conduct did not amount to negligence as a matter of law, we need not decide whether our holding in *Butaud II* applies to this case. The standard by which we will test the trial court's ruling was stated by Mr. Justice Dimond in *Cummins v. King & Sons*, 453 P.2d 466-67 (Alaska 1969):

> "[I]n order to justify submitting to the jury the question of whether the plaintiff himself was negligent, there must be evidence of such negligence. There must

be facts from which one could reasonably infer that such negligence existed. As to the quantity of evidence needed, the test is whether the facts and resulting inferences are such that reasonable minds could justifiably have different views on the question of whether the plaintiff had been negligent. If they could, then it would be proper to submit that issue to the jury for its determination under appropriate instructions. If they could not — if reasonable minds could reach only the conclusion that the plaintiff was not negligent — then submitting the issue to the jury would not be justified." [footnote omitted].

In our opinion a jury question was presented. Whether, in unloading a revolver, one who lets it drop out of his hand is negligent is a typical question of fact. It cannot be resolved as a matter of law. It is only in clear instances that negligence questions should be taken from the jury. The manner in which guns should be handled in particular circumstances is not a question of law; the only relevant rule of law is the general duty to act reasonably under any given set of circumstances. We believe that reasonable minds could differ in determining whether the plaintiff was negligent here. Therefore, a jury question was presented. We must reverse and remand for a new trial in which the jury is permitted to consider plaintiff's possible comparative negligence.

II
JURY INSTRUCTIONS

Sturm, Ruger's next points on appeal concern the propriety of certain jury instructions. Some of appellant's ob-

jections require little discussion.[2] Others, however, merit a closer examination.

Sturm, Ruger's principal objections are to the instruction which stated that the manufacturer's warnings were not to be considered in determining whether the product was defectively designed or manufactured[3] and to the instruction which told the jury that it was no defense for a manufacturer to show that his product was within the state of the art at

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[2]Appellant objects to jury instruction 13, which stated that "[a] defendant manufacturer may be liable under a theory of strict liability without proof of its own fault or negligence . . . ." Appellant argues that a lay jury is likely to equate "fault" with legal liability, and to allow recovery without finding the defendant liable. When this instruction is read in its entirety, however, appellant's objection loses much of its force. We find that the instruction, taken as a whole, is an accurate statement of the law.

Appellant also objects to this instruction because it failed to tell the jury that defendant is not liable unless plaintiff's injury resulted from a reasonably foreseeable use of the product. The transcript reveals that the trial judge intentionally omitted the element of foreseeability because there was no evidence that the gun was being used in an unforeseeable manner. The judge stated: "I'll find as a matter of law that the gun was being used in a manner which could or should have been reasonably foreseen by the Defendant, that is, it was being unloaded. Defendant should have realized that people would unload the gun. . . ." The judge additionally ruled that it was also reasonably foreseeable that someone might unload a gun while sitting in the cab of a pickup truck. We agree that no jury question of foreseeability was presented.

Appellant further objects to that part of instruction 13 which stated that "[a] product may also be defective if it lacks safety devices necessary to make it reasonably safe." Appellant claims that this instruction is tantamount to directing the jury to find that "lack of safety devices, per se, automatically establishes defectiveness." We do not agree. The jury was instructed that a product "may" be defective without safety devices. The jury was given other factors to consider in reaching a conclusion on the issue of defectiveness. There was no error.

[3]The instruction on warnings read:

> "Manufacturer's warnings intended to place a consumer on notice of conditions in the product that may affect its safe use and handling may not be considered by you in determining whether or not the product was defectively designed or manufactured.
>
> "However, you may consider such warnings in considering punitive damages if you find a design defect existed."

the time it was manufactured.[4] The jury was told, however, that these matters could be considered with regard to the punitive damage claim.

Sturm, Ruger objects to the instruction which removed the subject of product warnings from the jury's consideration.[5] The trial judge recognized that the instruction which he gave would not generally be a correct statement of the law. However, he felt justified in removing consideration of the warnings from the jury in this particular case.

The warnings in question told the consumer the hammer could not be released from the safety or loading notches "by *normally* pulling the trigger." They also stated that the revolver "can be fired by excessive pull on the trigger from either the safety notch position . . . or the loading notch position. . . . The loading notch and the safety notch provide only partial security. If these notches are damaged . . . they offer no security. . . . [A] light accidental blow on the hammer can readily cause the gun to discharge." The trial judge reasoned that even if these warnings had been read and followed, they could not have prevented the accident in which Day was injured from happening. He also was of the opinion that a warning which merely informs the consumer that the product contains a dangerous defect cannot absolve the manufacturer from liability for injuries caused by such defects.

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[4]The state of the art instruction read as follows:

> "In determining whether a product is defective for the purpose of strict liability, you are instructed that it is no defense for the manufacturer to prove that his product was within the state of the art at the time of manufacture or that it was designed and manufactured in a manner similar to that used by other manufacturers at the time of production. However, you may consider such evidence if you deliberate the question of punitive damages."

[5]See note 3, *supra*, for the text of the instruction.

A number of courts have held that the manufacturer's liability is not precluded merely because the danger from his product is obvious. *E.g.*, *Barker v. Lull Engineering Co. Inc.*, 573 P.2d 443, 451 (Cal. 1978); *Luque v. McLean*, 501 P.2d 1163, 1168-69 (Cal. 1972); *Micallef v. Miehle Co.*, 384 N.Y.S.2d 115, 348 N.E.2d 571 (N.Y. 1976); *Palmer v. Massey Ferguson*, 476 P.2d 713, 719 (Wash. App. 1970). We believe that this reasoning applies equally to products whose printed warnings alert the public to hidden dangers as well as to products whose dangers are patently obvious. In a New York case preceding *Micallef v. Miehle*, *supra*, in which the majority upheld the since-discarded patent/latent distinction, the dissent noted that safety features

> "are rarely there to protect those who are aware of a risk and voluntarily seek to encounter it. Safety features, be they guards, shields or fences, are of primary importance to protect the inadvertent plaintiff — the one who is not paying attention at the moment of the accident. In fact, the duty to provide safeguards is intended largely to protect against just such eventualities. Thus, for example, if a plaintiff were to have tripped and, being unable to steady himself, would have fallen toward the unguarded gears, of what value is it to him that the danger is obvious or patent?"

Meyer v. Gehl Company, 368 N.Y.S.2d 834, 835 (N.Y. 1975) (dissenting opinion of Mr. Justice Fuchsberg).

The same might be said of a product whose dangers have been pointed out to the user by way of a printed warning. The warnings provided by Sturm, Ruger would not protect the "inadvertent plaintiff" who accidently [sic] dropped the gun. Where the most stringent warning does not protect the public, the defect itself must be eliminated if the manufacturer is to avoid liability. *See*, *Wilk v. Georges*, 514 P.2d

877, 880 (Or. 1973); Prosser, *Torts*, at 394-95 (4th ed. 1971); Phillips, *The Standard for Determining Defectiveness in Products Liability*, 45 U. Cincinnati L. Rev. 101, 106 (1977); *see generally* Twerski, Weinstein, Donaher, and Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495 (1976).

Although in certain cases an adequate warning may prevent a product from being deemed defective,[6] the instant case was not of that type. The trial judge did not err in refusing to submit the warnings issue to the jury.

We note that the jury returned special verdicts, finding that the gun was defectively designed and that it was defectively manufactured.[7] Warnings or state of the art evidence could have no bearing on the issue of whether a product had a manufacturing defect, *i.e.*, that it deviated from the manufacturer's intended result.[8] A finding that the product was defectively manufactured and that the manufacturing defect was the proximate cause of plaintiff's injury are together sufficient to establish the manufacturer's liability and to support an award of compensatory damages in this case.[9] But, as set forth above, we must reverse the entire award because the question of comparative negligence was not submitted to the jury.

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[6]*See Restatement (Second) of Torts*, § 402A, comments *h* and *j*; Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 903 (Pa. 1975).

[7]As to the difference between design defects and manufacturing defects, see Caterpillar Tractor Co. v. Beck, ... P.2d ... (Opn. No. 1833, April 6, 1979), n.15.

[8]*See* Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 450 (Cal. 1978).

[9]In some cases, the plaintiff would also have to prove that the injury resulted from a use of the product which was reasonably foreseeable to the defendant. Barker v. Lull Engineering Co., Inc., *supra*, at 452 n.9. However, as we have stated above, the trial judge in the instant case correctly ruled as a matter of law that the plaintiff's use of the gun was reasonably foreseeable.

Generally speaking, "state of the art" refers to customary practice in the industry. *See Olson v. A. W. Chesterton Company*, 256 N.W.2d 530, 540 (N.D. 1977); Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. Cincinnati L. Rev., 101 , 115 n. 71 (1977). It is settled that evidence of conformity to industry-wide standards is not always conclusive in negligence actions. As Judge Learned Hand observed in *The T. J. Hooper*, 60 F.2d 737, 770 (2d Cir. 1932),

> "a whole calling may have unduly lagged in the adoption of new and available devices. [The industry] never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

In cases predicated upon strict liability, evidence of industry standards has even less probative value. In strict liability actions, the focus is on the condition of the product, not on the conduct of the defendant. *Bachner v. Pearson*, 479 P.2d 319, 325 (Alaska 1970). The trial court was thus stating a generally accepted principle when it instructed the jury that conformity to the state of the art does not constitute a defense to strict liability claims. *See also, Gelsumino v. E. W. Bliss Company*, 295 N.E.2d 110 (Ill. App. 1973); *Olson v. A. W. Chesterton Company, supra*; Karazek, *State of the Art or Science, Is it a Defense in Products Liability?* 60 Ill. B. J. 348 (1972).

While not, strictly speaking, a defense in a products liability action, state of the art may be considered in determining whether a product is defective. *See, e.g., Collins v. Ridge Tool Co.*, 520 F.2d 591 (7th Cir. 1975); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 367, 370 (1965). Thus appellant complains that the state of the art instruction was

erroneous and prejudicial, as the jury ought to have been instructed to consider state of the art evidence before deciding whether the product was in fact defective.

It is true that the instruction given did not define "state of the art,"[10] and its applicability as one factor to be considered in determining whether the product was defective was not made clear to the jury. However, this is not the problem which troubles us the most with the instruction. As we will develop below, the state of the art instruction alone would not require reversal of the entire judgment. But the point raised as to this instruction gives rise to a broader problem: whether the notion of design defect was properly defined for the jury.

In *Caterpillar Tractor Co. v. Beck* (Opn. No. 1833, Alaska, April 6, 1979), we adopted the test for design defect liability found in *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443 (Cal. 1978). *Barker* contains two alternative tests for design defect, the second of which is a two prong test. Under the test,

> [A] trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design.

The instructions in the case before us did apprise the jury of the first part of the *Barker* test, but the rest of the instructions contained only the first prong of the second part

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[10]See note 4, *supra*, for the text of the state of the art instruction.

of the *Barker* test, eliminating the second prong which allows the jury to weigh, in light of the relevant factors, the benefits of the design against the risk of danger inherent in the design. A majority of this court is of the opinion that no jury question was presented on this issue, and that the risk of danger inherent in the design of the product so outweighed the benefits of that design that the superior court, if it had considered this question, would have had to enter a directed verdict for the plaintiff.[11] Therefore, the failure to give an instruction on this issue was not error.

III
PUNITIVE DAMAGES

Sturm, Ruger urges us to repudiate the doctrine of punitive damages in Alaska on the ground that imposition of punitive damages violates the state and federal constitutions. Appellant also contends that punitive damages should not be awarded as a matter of public policy. In addition, Sturm, Ruger argues that punitive damages have no place in the "fault-free" context of strict products liability.

In the event that we would decline to rule in appellant's favor on the above questions, Sturm, Ruger maintains that the evidence introduced in the instant case was not sufficient to support an award of punitive damages. Appellant also challenges certain evidentiary rulings relevant to the area of punitive damages, and claims that the amount of damages awarded was excessive.[12]

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[11]The author of this opinion and Justice Rabinowitz disagree with the majority on this issue, and would reverse and remand the case for a new trial on this question.

[12]Day claims that Sturm, Ruger has waived most of these issues by failing to raise them in the trial court. It is true that Sturm, Ruger did not immediately challenge the propriety of punitive damages in general. However, these points were presented to the trial court in a memorandum filed prior to the submission of the case to the jury. While the better practice would have been to raise these questions earlier in the proceedings, and to have briefed them more thoroughly, we cannot say on the record before us that these points have been waived.

Sturm, Ruger's constitutional arguments, summarized briefly, are that imposition of punitive damages violates due process guarantees because the jury has no standards by which to determine the extent of a defendant's culpability and the amount of damages to be assessed. Appellant further argues that the punitive damages doctrine lends itself to arbitrary application and does not provide fair warning of what conduct will subject a person to punishment.

In *Bridges v. Alaska Housing Authority*, 375 P.2d 696, 702 (Alaska 1962), the court noted that in order to recover punitive or exemplary damages, the plaintiff must prove that the wrongdoer's conduct was "outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another." Actual malice need not be proved. Rather, "[r]eckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages." *Restatement (Second) of Torts*, § 908 (Tent. Draft No. 19, 1973).

In the instant case, the jury was instructed to consider whether the defendant knew its design was defective and had caused injuries or death. The jury was then told that if the defendant "acted with reckless indifference toward the safety of its customers, or that its acts were maliciously or wantonly done," punitive damages could be awarded in addition to compensatory damages. The trial judge cautioned the jury to exercise discretion and reason and not to be motivated by sympathy, bias, or prejudice with regard to the punitive damages question.

We find these standards to be sufficient in order to meet a void-for-vagueness challenge. Other courts have reached the same conclusion when presented with this question. *E.g., Egan v. Mutual of Omaha Ins. Co.*, 133 Cal. Rptr.

899, 914-15 (Cal. App. 1976) and cases cited therein; *Kink v. Combs*, 135 N.W.2d 789, 797 (Wis. 1965).

We also reject the argument that punitive damages have no place in a strict liability case, although we do agree with appellant that punitive damages ought not be awarded in every products liability case. Where, however, as in the instant case, plaintiff is able to plead and prove that the manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the design defect, but continued to market the product in reckless disregard of the public's safety, punitive damages may be awarded. *See, e.g., Gillham v. The Admiral Corporation*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398 (Cal. App. 1967);[13] *Moore v. Jewel Tea Company*, 253 N.E.2d 636 (Ill. App. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

Punitive damages are designed not only to punish the wrongdoer, but also to deter him and others like him from similar wrongdoing in the future. *Restatement (Second) of Torts*, § 908(1) (Tent. Draft No. 19, 1973). We believe that as a matter of public policy, punitive damages can serve several useful functions in the products liability area.[14] For example, the threat of punitive damages serves a deterrence function in cases in which a product may cause numerous

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[13] *Contra*, Roginsky v. Richardson-Merrell, 378 F.2d 832 (2d Cir. 1966), a case involving the same course of conduct by the same manufacturer. A three-judge panel, with one judge dissenting, found insufficient evidence to warrant submitting the question of punitive damages to the jury. Like the California court in *Toole*, we take note of the *Roginsky* case, while declining to follow the Second Circuit's lead.

[14] *See generally*, D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976). Professor Owen systematically examines and refutes each argument which has been proposed for not allowing punitive damages in products liability cases.

minor injuries for which potential plaintiffs might decline to sue, or in cases in which it would be cheaper for the manufacturer to pay compensatory damages to those who did present claims than it would be to remedy the product's defect. In addition, if punitive damages could not be awarded in the products liability context, a reckless manufacturer might gain an unfair advantage over its more socially responsible competitors. On balance, we find the arguments advanced by appellant in favor of its position to be outweighed by the sound public policy considerations supporting the imposition of punitive damages in appropriate cases. We therefore decline to jettison the doctrine of punitive damages in this area of the law.

We turn next to Sturm, Ruger's claim that there was insufficient evidence to sustain the jury's award of punitive damages. The evidence presented at trial indicated that top officials at Sturm, Ruger knew that the safety and loading notches of their single action revolver presented a danger of accidental discharge because of the propensity of the engaging middle parts to fail or break. The evidence also reflects knowledge on the part of Sturm, Ruger management that serious injuries had resulted from this deficiency, coupled with procrastination in changing the basic design, at an increased cost of $1.93 per gun. Because we find that fair-minded jurors in the exercise of reasonable judgment could differ as to whether Sturm, Ruger's actions amounted to reckless indifference to the rights of others, and conscious action in deliberate disregard of them, thereby evidencing a state of mind which could justify the imposition of punitive damages, we will not upset the jury's conclusions that punitive damages were warranted.

Sturm, Ruger next contends that the punitive damage aspect of the case was plagued by evidentiary and procedural

errors.[15] Having carefully reviewed the relevant portions of the record, we conclude that no reversible error was committed.

Appellant's final contention regarding punitive damages is that the amount awarded was excessive. We have previously held that the decision to order a remittitur or a new trial rests within the sound discretion of the trial court. *E.g.*, *Haskins v. Shelden*, 558 P.2d 487, 494 (Alaska 1976), and cases cited therein. We will not interfere with the trial court's decision unless we are "left with a firm conviction on the whole record that the trial judge made a mistake in refusing to order a remittitur or grant a new trial," (*City of Nome v. Ailak*, 570 P.2d 162, 173 (Alaska 1977) (footnote omitted), and where intervention on our part is necessary to prevent a miscarriage of justice.

One means of determining if an award of punitive damages is excessive is to compare it with the amount of actual damages. Professor McCormick observes:

> "The punitive damages given, it is said, must bear some reasonable proportion to the actual damages. As a rough working scale, this is better than nothing." [footnotes omitted]

McCormick, *Law of Damages*, Sec. 85, 298 (1935). Exemplary damages may exceed the actual damages, however, and no definite ratio between them is prescribed. *Taylor v. Williamson*, 196 N.W. 713 (Iowa 1924). Other important factors which bear on the question include "the magnitude

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[15]The contentions were that evidence of the company's gross wealth and of William Ruger's personal financial condition was erroneously admitted; that evidence which tended to militate against or reduce punitive damages was erroneously excluded; and that the trial court erred in admitting evidence of certain other accidents and lawsuits involving Sturm, Ruger guns. In addition, appellant argued that the jury was uninstructed on some aspects of the law relating to punitive damages, and misinstructed on others.

and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant." *Zhadan v. Downtown L.A. Motors*, 136 Cal. Rptr. 132, 143 (Cal.App. 1976).

In his comprehensive law review article, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976), Professor Owen argues cogently that while punitive damages should be awarded in appropriate cases, the awards should be subjected to greater scrutiny than in many cases in the past. Indeed, he finds a recent trend toward tightened judicial control over punitive damages. *Id.* at 1321.[16] Moreover, judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The spectre of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review.[17]

The compensatory damages awarded to Michael Day and against Sturm, Ruger amounted to $137,750, exclusive of

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[16]He gives as an example Jolley v. Puregro Co., 496 P.2d 939 (Idaho 1972). The trend can also be seen by comparing the origianl *Restatement of Torts* with the newer version. *See Restatement (Second) of Torts*, Sec. 908, commend [sic] *d*, at 81-82 (Tent. Draft No. 19, 1973).

[17]Among the factors which, according to Professor Owen, should be taken into account are:

"(1) the amount of the plaintiff's litigation expenses;
(2) the seriousness of the hazard to the public;
(3) the profitability of the marketing misconduct (increased by an appropriate multiple);
(4) the attitude and conduct of the enterprise upon discovery of the misconduct;
(5) the degree of the manufacturer's awareness of the hazard and of its excessiveness;
(6) the number and level of employees involved in causing or covering up the marketing misconduct;
(7) the duration of both the improper marketing behavior and its cover-up;
(8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and
(9) the total punishment the enterprise will probably receive from other sources."

costs, prejudgment interest, and attorney's fees. The punitive damage award of $2,895,000 appears to be so out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice. The jurors apparently responded to an invitation to punish Sturm, Ruger for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff. *See, Egan v. Mutual of Omaha Ins. Co.*, 133 Cal. Rptr. 899, 919-20 (Cal. App. 1976). Under the circumstances, it was a mistake and an abuse of discretion for the trial judge not to have reduced the punitive damages or to have ordered a new trial.

After a careful review of the evidence and all of the factors which should bear upon this determination, it is our opinion that if punitive damages are awarded at a second trial, on essentially the same evidence as that presented in the first trial, they should not exceed $250,000. That amount is quite sufficient to achieve the deterrent purposes to be served, without at the same time inflicting a penalty disproportionate to the defendant's wrong.[18]

Of course, at any new trial the court should permit the jury to make the initial determination of punitive damages. If essentially the same evidence as that presented at the first trial is presented at the second trial, and if the jury's award exceeds $250,000, the court should then exercise its power to grant remittitur in accordance with this opinion.

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[18]We recognize also that an award of punitive damages serves to reward the private plaintiff for enforcing the rules of law against one who otherwise would not be coerced into observing those rules.

In summary, we reverse the award of compensatory damages, and remand for a new trial as to both compensatory and punitive damages. We need not address the question of attorney's fees raised by appellee on cross-appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DIMOND, Senior Justice, dissenting in part.

The court holds that whether, in unloading a revolver, one who lets it drop out of his hand is negligent is a typical question of fact for determination by a jury, and cannot be resolved as a matter of law.

The evidence in the case was to the effect that Day was holding the revolver with both hands between his legs, with the gun pointing toward the floor of the pickup in which he was sitting. While he was unloading the gun, the hammer was resting on the loading notch, which was designed so that the hammer could not be released from that position by normally pulling the trigger. The gun started to slip, Day grabbed it and it fired.

These facts establish nothing more than that the gun slipped and Day grabbed it, obviously to prevent the gun from hitting the floor of the pickup, and that the gun then fired. From these facts, there is no inference that Day was negligent — that he had failed to exercise reasonable prudence for his own safety. Accidents may happen in the absence of negligence. *Cummins v. King & Sons,* 453 P.2d 465, 467 (Alaska 1969). An object, such as a fairly heavy revolver, may slip from one's hands without there being any failure on one's part to have exercised reasonable prudence to avoid having that happen. In order to create an inference of lack of reasonable [sic] prudent care in such a situation, there must be facts from which such inference may logically be deduced. There were no such facts presented in this case.

One might suggest that the reason the gun fired was because Day's finger engaged the trigger when he grabbed the gun to prevent it from falling to the floor. If the hammer had been on the full cock notch, then this would indicate carelessness on Day's part because the gun was designed

to fire in this situation. But this was not the case. The hammer was resting on the loading notch position which, like the safety notch, was designed so that the hammer could not be released by normally pulling the trigger. Day was engaged in unloading the pistol at the time, and the hammer was in precisely the position it was supposed to be for loading or unloading. There is here no inference of negligence on the part of Day.

The facts presented at the trial and the resulting inferences are such that reasonable persons could not justifiably have different views on whether Day was negligent in his handling of the gun, but could only reach the conclusion that Day was not negligent. *Cummins v. King & Sons*, 453 P.2d 465, 466-67 (Alaska 1969). In my opinion, the trial judge was correct in not submitting this issue to the jury.[1]

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[1]I would reach the same result even if, under the facts presented at the trial, one could reasonably infer that Day had failed to exercise ordinary care for his own safety. In Caterpillar Tractor Co. v. Beck, ... P.2d ..., Opn. No. ..... (Alaska, 1979), I took the position, contrary to that of the majority of the court, that

> in a product liability action where there is a defect in the manufactured product and the danger of using the product in such condition is apparent to the plaintiff, a degree of fault may be attributed to the plaintiff to reduce the damages to which he or she would be entitled only where his or her use of the product is highly unreasonable, or where there has been a substantial departure from the ordinary care expected of the reasonably prudent person in like circumstances. [footnote omitted]

Certainly, if cannot be said here that Day's handling of the pistol while unloading it constituted such an aggravated form of fault on his part so as to open the door to the application of the principles of comparative negligence.

BURKE, Justice, dissenting in part.

I think the trial judge's refusal to allow the jury to consider Sturm, Ruger's claim that Day's injury was due, all or in part, to his own negligence was correct. Thus, on that issue I join in the dissenting opinion of my esteemed colleague, Senior Justice Dimond. I also disagree with the majority's conclusions that the jury's award for punitive damages was the result of passion or prejudice and that it was an abuse of discretion for the trial judge not to have reduced the award or ordered a new trial.

The trial court instructed the jury that it could return a verdict for punitive damages for injuries caused by a design defect only upon a finding "that [Sturm, Ruger] acted with reckless indifference towards the safety of its customers, or that its acts . . . were maliciously or wantonly done." The jury concluded that Sturm, Ruger's conduct came within that instruction, and the record certainly supports such a conclusion. As to the amount of the award, the formula that the jury apparently used suggests to me that its verdict was the result of careful deliberation and a keen sense of justice, rather than impermissible passion and prejudice.

The evidence showed that Sturm, Ruger manufactured over 1,501,000 revolvers of the type causing Day's injury Sturm, Ruger's profit from the manufacture and sale of those firearms alone was enormous, totalling many millions of dollars. At trial, William Ruger, the president and founder of Sturm, Ruger, testified that redesign of the revolver to cure the defect cost approximately $199,000 and that the increased manufacturing cost per revolver was $1.93. The figure agreed upon by the jury as an appropriate award for punitive damages equalled the amount of the increased manufacturing cost per item multiplied by the approximate number of revolvers sold: $1.93 × 1,500,000 =

$2,895,000. Thus, the amount of the award is roughly equal to the profit directly attributable to Sturm, Ruger's callous disregard for the safety of its customers. Such being the case, I think there is no merit to the contention that the figure was the result of improper passion or prejudice. Certainly, the amount of the punitive damage award far exceeded Day's actual damages. However, given the purpose of punitive damages, the award was not excessive.

As to all other issues, I concur in the view expressed by the majority. Thus, I would affirm the judgment of the superior court.

APPENDIX B.
Opinion on Rehearing.

The Supreme Court of the State of Alaska.

Sturm, Ruger & Co., Inc., a Connecticut corporation, Appellant, v. Michael James Day, Appellee. File No. 3092.

Michael James Day, Cross-Appellant, v. Sturm, Ruger, & Co., Inc., a Connecticut corporation, Cross-Appellee. File No. 3135.

(No. 2153 — August 22, 1980).

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, James R. Blair, Judge.

Appearances: Robert L. Richmond, Richmond, Willoughby & Willard, Anchorage, and Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin and Edward L. Lascher (in association), Anchorage, for Appellant/Cross-Appellee. H. Bixler Whiting, Fairbanks, for Appellee/Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor, Boochever, and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating]

CONNOR, Justice.

BURKE, Justice, dissenting.

DIMOND, Senior Justice, concurring and dissenting.

In our original opinion in this case, *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 49 (Alaska 1979), we reversed and remanded for a new trial as to both compensatory damages and punitive damages. We also held that "if punitive damages are awarded at a second trial, on essentially the same evidence as that presented in the first trial, they should not exceed $250,000." 594 P.2d at 49.

We have received several briefs on rehearing. After considering these further arguments of the parties, we have decided to modify our previous opinion and holdings in certain respects.

I.

Day requests that we remand for the limited purpose of ascertaining his comparative negligence, rather than reversing the award of compensatory damages and remanding for an entire new trial. He contends that the amount of compensatory damages is not challenged, and that to retry that aspect of the case would unnecessarily entail extensive time and expense, *e.g.*, in recalling expert medical witnesses. Sturm, Ruger is not strongly opposed to letting the original jury award of compensatory damages stand on remand, although "if pressed" it "would probably opt for . . . a full re-trial." In fact, Sturm, Ruger acknowledges that "there is much to be said for informing the jury on retrial that the quantum of compensatory damages has been resolved," submitting to the panel only the question of the percentage of fault to be attributed to the plaintiff and to the defendant.

In *State v. Kaatz*, (also known as *Kaatz II*), 572 P.2d 775 (Alaska 1977), we approved the use of partial new trials on the issue of percentage apportionment of comparative fault in the cases where the evidence on liability is separable from the evidence on damages. In such cases, we stated,

> "the court should instruct the jurors that (1) they must assign some percentage of the negligence to each party, (2) the total damages are in the sum found by the previous trier of fact (unless the same jury is also retrying the damage issue), and (3) their sole function is to apportion the negligence between the parties."

573 P.2d at 785, n.11 [sic].

In *Kaatz II*, we held that the trial court erred in failing to retry the damages question after we remanded for a new trial on fault and damages. Failure to retry damages in that case was potentially prejudicial to the defendant because it had not offered evidence at trial on the issue of damages, apparently in the belief that under the contributory negligence doctrine plaintiff's claim should have been barred entirely. However, we also held that it was appropriate for the trial judge to apportion negligence on remand, while submitting the question of damages to the jury, since the evidence on liability was almost entirely separate from the evidence on damages. In such cases, we noted: "[I]f the trier of fact performs its function correctly, it will consider the two issues wholly separately." *Id.* at 785.

Sturm, Ruger has cited no cases which prohibit the use of a partial new trial on the issue of comparative fault while leaving the original award of damages intact. It does, however, point to cases from other jurisdictions which hold that the general issue of liability cannot be separated from the issue of the percentage of negligence attributable to each party on retrial. *Begin v. Weber*, 234 N.W.2d 192 (Minn. 1975);[1] *Juvland v. Mattson*, 184 N.W.2d 423 (Minn. 1971). The question of damages, on the other hand, can be, and is, answered independently of liability. *See Ferguson v. Northern States Power Co.*, 239 N.W.2d 190, 196 (Minn. 1976).

It has been held that a partial new trial will not be permitted "where a tangled or complex fact situation would make it unfair to one party to determine damages apart from liability, or where 'there is reason to think that the verdict

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[1]In *Begin*, the court noted that there was no reason to retry the damages issue, since the jury award seemed reasonable. 234 N.W.2d at 195.

may represent a compromise among jurors with different views on whether the defendant was liable.' " [citations omitted] *Vizzini v. Ford Motor Co.*, 569 F.2d 754, 760 (3d Cir. 1977). In Alaska, whether the issues are sufficiently separable to warrant a partial new trial depends upon the facts and circumstances of each case. *See Poulin v. Zartman*, 542 P.2d 251, 276 (Alaska 1975).

In the present case the damage issue was fully litigated at the first trial, neither party contests the jury's award of compensatory damages, there is no evidence that the damage award reflects a compromise verdict, and appellant has made no showing that it would be prejudiced by failure to retry the damages issue. Although there is always the chance that new evidence of fault would affect the jury's determination of damages, we believe that in this case the evidence on liability is almost entirely separate from the evidence on damages, and the potential for prejudice is slight. In order to limit the time and expenditure required by a new trial, we direct that there shall be a partial new trial on the issue of comparative fault, letting the amount of compensatory damages remain intact.

The partial new trial shall be limited to determining the comparative fault of the parties.

II.

Day argues that the punitive damage question should not be remanded for a new trial, since the trial judge never ruled on the question of remittitur. In our original opinion, we held that the trial court erred in ruling that the remittitur motion was untimely under Rule 59(f). Thus, Day maintains that, having now ruled that the question of excessive damages was properly before the trial court, we should remand for the trial court to consider remittitur, rather than determining the question ourselves.

On reflection, we have decided upon a different course. We believe that a mistake was made when we held in our original opinion that the punitive damage award of $2,895,000 "appears to be so out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice." 594 P.2d at 48.

After reviewing the record once more, we are now of the opinion that the punitive damage verdict was not the result of passion or prejudice. It was simply an excessive verdict when viewed according to the various factors set forth in our original opinion.[2] *Id.* 594 P.2d at 48, n.17.[3] Therefore, there is no reason to remand for either a new trial or a trial court ruling on remittitur.[4] If we were to remand, and if the trial court granted a remittitur, it is highly probable that the question of excessive damages would again be presented to us in an additional appeal. Judicial economy dictates that we make the decision ourselves at this time.

After further consideration of the evidence in the record and the factors, mentioned above, which bear upon the

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[2]*See* Jenkins v. Commodore Corporation Southern, 584 S.W.2d 773, 778 (Tenn. 1979). There the court held that a verdict for compensatory damages was excessive and subject to reduction through remittitur, even though it was not the result of passion or prejudice. Its mere excessiveness, the court held, did not warrant the conclusion that it was the result of emotion, prejudice, or improper motive on the part of the jurors. The verdict was for $250,000, and it was reduced through remittitur to $100,000.

Although that case concerned compensatory rather than punitive damages, the underlying principle is the same.

[3]We still believe that a comparison of actual damages with the punitive damages is a factor which may enter into the determination of excessiveness. However, there may be cases in which it is of only slight value or is totally inapplicable.

[4]If the verdict were tainted because of passion or prejudice, we might well be required to grant a new trial, and not permit remittitur by the trial court. *See* International Brotherhood of Teamsters, Local 959 v. King, 572 P.2d 1168, 1179 (Alaska 1977); Hash v. Hogan, 453 P.2d 468, 473 (Alaska 1969).

reduction of an excessive punitive damage award, we are of the view that in our original opinion we reduced the award unduly. In our opinion the award should be reduced to the amount of $500,000 rather than the $250,000 set by our original opinion. Moreover, judgment for $500,000 in punitive damages may be entered immediately upon remand.[5]

This case is to be remanded to the superior court for further proceedings consistent with this opinion.

REMANDED.

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[5]Alternatively, Day is entitled to a new trial in the event that he does not accept the remittitur. *See* Kennon v. Gilmer, 131 U.S. 22, 29-30 (1889); Anno., 53 A.L.R. 779, supplemented at 95 A.L.R. 1163; 6 A J. Moore, Federal Practice, sec. 59.05[3] at 59-61 (2d ed. 1948 and Supp. 1979).

BURKE, Justice, dissenting.

I am more convinced now than ever that the court made a serious mistake in holding (1) that Sturm, Ruger was entitled to an instruction on comparative negligence and (2) that the jury's award of punitive damages was excessive. On rehearing, I would modify our original holding and affirm the judgment of the superior court.

I

It is still my opinion that there was no evidence of negligence on the part of the plaintiff. As noted by Senior Justice Dimond in his original dissent, the evidence established "nothing more than that the gun slipped and Day grabbed it." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 49 (Alaska 1979) (Dimond, Sr. J., joined by Burke, J., dissenting). There is simply nothing in the record to suggest that Day's conduct amounted to a failure to exercise ordinary care.

Even if Day was guilty of negligence, however, I would still deny Sturm, Ruger the benefit of a comparative negligence instruction. As evidenced by the fact that it awarded punitive damages to Day, the jury found, in accordance with the court's instructions, "that [Sturm, Ruger] acted with reckless indifference toward the safety of its customers. or that its acts . . . were maliciously or wantonly done." Day, on the other hand, if negligent at all, was certainly guilty of nothing more than ordinary negligence. A rule that allows such a defendant the benefit of an instruction on comparative negligence is, in my opinion, both bad law and a sad commentary on our perception of the public policy

of this state.[1] Yet, that is exactly the rule that we have established by our holding in this case.

II

On the issue of punitive damages, I applaud the majority's retreat from its original position that the amount of the award suggested that the jury's verdict was the result of impermissible "passion or prejudice," and its decision to allow an award of $500,000, on remand, rather than limiting the award to $250,000. I still believe, however, that the jury's verdict was entirely justified, given the purpose of punitive damages.[2] *Id.* at 50 (Burke J., dissenting).

Perhaps the most disturbing aspect of this case to me is the message that it holds for the manufacturing and mar-

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[1]Of the few courts which have addressed this question, most have held, or at least indicated in dicta, that the plaintiff's conduct can and should be compared with the defendant's aggravated misconduct, and his recovery reduced accordingly. *See, e.g.*, Anderson v. Eagle Motor Lines, Inc., 423 F.2d 81, 83 (5th Cir. 1970); Billingsley v. Westrac Co., 365 F.2d 619, 623 (8th Cir. 1966); Li v. Yellow Cab Co. of California, 532 P.2d 1226, 1241 (Cal. 1975); Bielski v. Schulze, 114 N.W.2d 105, 113 (Wis. 1962). At least two courts, however, have held that a plaintiff's ordinary negligence should not be compared to a defendant's aggravated misconduct, to reduce the former's recovery, although they differ as to the kind of aggravated misconduct that will bar comparison. In Ryan v. Foster & Marshall, Inc., 556 F.2d 460 (9th Cir. 1977), the Ninth Circuit Court of Appeals, applying Oregon law, upheld the district court's determination that "the plaintiff's comparative negligence could not be used to offset the defendant's gross negligence." *Id.* at 465. A New Jersey Superior Court, in Draney v. Bachman, 351 A.2d 409 (N.J. Super. 1976), held that fault should be compared when the defendant has been grossly negligent but not when his conduct can be characterized as "wilful and wanton." *Id.* at 414-15. The court stated: "It is to such conduct that punitive damages may attach, with aim of punishing the offender and precluding repetition of the act. Comparative negligence should not apply in such cases." *Id.* at 415 (citations omitted).

[2]Although the majority alludes to those factors that we said should be considered in determining the amount to be awarded as punitive damages, Sturm, Ruger & Co. v. Day, 594 P.2d at 48 n.17, and purports to apply them, I think the majority, in reality, ignores those factors, choosing, instead, to simply substitute its own judgment for that of the jury.

keting world: Concerned by "[t]he spectre of bankruptcy and excessive punishment," *Id.* at 48, we will allow a manufacturer, motivated by considerations of profit, who acts with callous and calculated disregard for the lives and safety of its customers, to keep all but a small part of the profits *directly attributable to its misconduct*. Rather than give a windfall, *i.e.*, non-compensatory damages, to an *innocent* purchaser seriously injured by the manufacturer's failure to correct a known, dangerous defect, we will allow the windfall, instead, to go to the guilty party. We will lend our protection and assistance to that manufacturer, by enabling it to compete more effectively against its safety conscious competitors, *i.e.*, those who have cut into their own profits, thereby making them less able to compete in the marketplace, by devoting money and effort to the research, design considerations and manufacturing techniques necessary to discover and avoid risk of harm to those purchasing and using their products. In other words, we will encourage, rather than discourage the wrongdoer, by giving the wrongdoer an economic advantage over those competitors who function in a responsible manner.

DIMOND, Senior Justice, concurring and dissenting.

I agree with the opinion on rehearing to the extent that, on the issue of comparative fault, only a partial new trial will be required, and that the amount of compensatory damages awarded at the original trial shall remain intact. However, I still adhere to my original dissent which was and still is to the effect that reasonable persons could not justifiably have different views on the question of whether Day was negligent in his handling of the revolver, but could only reach the conclusion that he was not negligent. *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 49-50 (Alaska 1979). Therefore, in my opinion, even a partial new trial on the issue of comparative fault should not be required.

I concur with the opinion on rehearing to the extent that it reduces the award for punitive damages to $500,000.00, rather than to the sum of $250,000.00 as required by the original opinion in this case, and that a judgment for $500,000.00 in punitive damages may be entered on remand.

APPENDIX C.

Opinion on Rehearing.

The Supreme Court of the State of Alaska.

Sturm, Ruger & Co., Inc., a Connecticut corporation, Appellant, v. Michael James Day, Appellee. File No. 3092.

Michael James Day, Cross-Appellant, v. Sturm, Ruger & Co., Inc., a Connecticut corporation, Cross-Appellee. File No. 3135.

[No. 2330 — April 24, 1981].

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, James R. Blair, Judge.

Appearances: Robert L. Richmond, Richmond, Willoughby & Willard, Anchorage, Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin and Edward L. Lascher (in association), Anchorage, for Appellant/Cross-Appellee. H. Bixler Whiting, Whiting & Rosie, Fairbanks, for Appellee/Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor, and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating]

CONNOR, Justice.

Appellee has petitioned for further rehearing as to one question not addressed in our opinion on rehearing, *Sturm, Ruger & Co., Inc. v. Day*, 615 P.2d 621 (Alaska 1980), and we have granted rehearing.

In awarding attorney's fees at the close of this case, the superior court did not award any fee as to the punitive damage portion of the judgment, because the court believed that it was inappropriate to award an attorney's fee as to punitive damages. In our opinion this was error.

In *Haskins v. Shelden*, 558 P.2d 487 (Alaska 1976), we stated, in connection with the question of attorney's fees as to a punitive damage award:

> "Civil Rule 82(a) provides a schedule of attorney's fees which are to be allowed to the prevailing party as costs of litigation. Rule 82(a)(1) directs that the schedule will be adhered to 'in fixing such fees for the party recovering *any* money judgment,' 'unless the court, in its discretion, otherwise directs. . . .' " (emphasis in original).

558 P.2d at 495.

The trial court has broad discretion in determining the appropriate attorney's fee. But it cannot arbitrarily deny attorney's fees on a punitive damage award.[1] If it departs from the schedule in Civil Rule 82, it must give reasons for its nonadherence to the schedule.

Therefore, as in *Haskins v. Shelden*, we direct that on remand the superior court should be guided by Civil Rule 82 in determining an attorney's fee as to both compensatory and punitive damages.

REMANDED.

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[1]*See* Cooper v. Carlson, 511 P.2d 1305, 1310 (Alaska 1973).

The importance of awarding attorney's fees as to punitive damages is apparent when one considers torts such as defamation. Sometimes the actual damages are merely nominal, but the punitive damages are substantial, and serve to vindicate the plaintiff's reputation, as well as to deter defamatory behavior. In such a case it would be unreasonable to base an attorney's fee award solely on the amount of nominal damages.